SUPREME COURT, U. S.

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ERWIN N. GRISWOLD, CLERK

No. 1024

In the Supreme Court of the United States

OCTOBER TERM, 1967

EMILIO PIZZARELLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES

The judgment of the court of appeals was entered on November 17, 1967. The opinion below (Pet. App. 2a–4a) is not yet reported. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to January 16, 1968, and the petition was filed on January 15, 1968.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of an indictment charging him with engaging in the business of accepting wagers without paying the federal wagering tax and without registering with the District Director of Internal Revenue. On May 10, 1966, petitioner was

289-927—68

fined $4,000 on the first count and a penalty of $50 was imposed on the second count. The court of appeals affirmed.

Petitioner asserts here, as he did in the court below, that the federal wagering tax statutes and the related registration requirement (26 U.S.C. 4401, 4411, 4412) violate his Fifth Amendment privilege against self-incrimination. In *Marchetti* v. *United States,* No. 2, this Term, decided January 29, 1968, this Court concluded that the wagering occupational tax statute and the related registration provision "may not be employed to punish criminally those persons who have defended a failure to comply with their requirements with a proper assertion of the privilege against self-incrimination." In *Grosso* v. *United States,* No. 12, this Term, also decided January 29, 1968, the Court reached the same result with respect to the wagering excise tax.[1] Petitioner appears to have properly asserted the Fifth Amendment in defense of his failure to comply with the wagering tax laws. It was for that failure that he was convicted. Accordingly, we suggest that the petition for a writ of certiorari be granted, that the decision of the court below be vacated and the case re-

[1] Because of the pendency of *Marchetti* and *Grosso* in this Court, the court of appeals refrained from discussing petitioner's privilege against self-incrimination claim and adhered to its previous position that the wagering tax laws were not unconstitutional (see Pet. App. 4a, n. 1).

manded for reconsideration in light of the *Marchetti* and *Grosso* decisions.[2]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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[2] In view of the relevance of the Court's decisions in these cases, it appears unnecessary to discuss petitioner's further contention (Pet. 6–7) that his arrest was unlawful.

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